United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

755

BRIEF FOR APPELLANT BILLIE AUSTIN BRYANT

In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

BILLIE AUSTIN BRYANT,
Appellant,

v. No. 23,558

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PATRICIA ROBERTS HARRIS
Counsel for Appellant
(Appointed by this Court)

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RULE INVOLVED

Rule 32, Federal Rules of Criminal Procedure:

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

* * *

(c) Presentence Investigation.

* * *

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

REFERENCE TO RULING

Transcript of Sentencing, September 8, 1969.

STATEMENT OF ISSUES PRESENTED

(1) Whether the due process clause of the Fifth Amendment requires that a judge imposing an unusually long sentence make findings of the special circumstances of the defendant that make such a sentence necessary.

(2) Whether the due process clause of the Fifth Amendment requires the disclosure to the defense by the sentencing judge of presentence reports on which an exceptionally long sentence is to be based.

(3) Whether refusal of the sentencing judge to disclose to defense counsel the contents of a presentence report is a denial to the defendant of the right to assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States.

(4) Whether failure to disclose the presentence report on which the judge's sentence is based deprives appellant of a basic element of the right of allocution.

This case was previously before this Court in Bryant v. United States of America, No. 21,863 (1969).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based on 28 U.S.C. Section 129.

STATEMENT OF THE CASE

Appellant was resentenced on September 8, 1969 on remand from this Court. See Bryant v. United States of America, No. 21,863 (D.C. Cir. 1969). Request for the inspection of presentence reports was denied,

the sentencing judge citing in support of the denial United States v. Isaacs, 299 F.Supp. 380 (D.D.C. 1969) and United States v. Conway, 296 F.Supp. 1284 (D.D.C. 1969). Tr. of Sentencing, Sept. 8, 1969, p.2.[1] Appellant apparently had no record prior to his conviction in the instant case, and had received an honorable discharge from the United States Navy.[2] Tr. of Sentencing, April 5, 1968, p.1.

Appellant was convicted in United States v. Bryant, Crim. No. 849-67, of three armed robberies of two different savings and loan associations in violation of 18 U.S.C. §2113(a). No shots were fired and no one suffered physical injury during the robberies. Nonetheless, prior to hearing evidence in appellant's case the trial judge (who was also the sentencing judge) announced an intention to impose a substantial sentence (Tr. 148). At the time of the original sentencing, the sentencing judge heard defense counsel's statement of absence of any

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1/ Counsel had requested inspection of the presentence reports in the judge's chambers before the sentence hearing, and was instructed to make the motion in open court. No indication was given of whether the request would be granted or denied.

2/ Subsequent to the conviction and sentence in United States v. Bryant, Crim. No. 849-67, appellant escaped from the Lorton Reformatory from which he was a fugitive for several months. He was apprehended, tried and convicted of two homicides committed while he was a fugitive. The resentencing took place while he awaited trial on the murder charge.

prior record, but stated that because "of the serious nature of the crimes committed, including a complete disregard for the lives of others, the Court has determined that the defendant must be separated from society for a long time." Tr. of Sentencing, April 5, 1968, p.4. The court stated further that "In addition to punishment this sentence, I hope, and it must also have a deterrent effect on others." Ibid. Appellant was given consecutive sentences for each of the three robberies, for an aggregate of eighteen to fifty-four years.

Additional sentences for entering the three savings and loan associations were set aside by the Court of Appeals in Bryant v. United States, No. 21, 863 (D.C. Cir. 1969) and the case remanded for resentencing on the robbery convictions. The Appellate Court said, therein, "We think appellant's contentions regarding the adverse effect of the consecutive sentences upon appellant's rehabilitative potential should be addressed to the sentencing court." Ibid, at p.7.

After denial at the resentencing hearing of inspection of the presentence report, counsel for appellant urged elimination or reduction of the aggregate sentence, particularly, the high minimum. Tr. of Sentencing, Sept. 8, 1969, p.5.

Without comment on the issue of consecutive sentences and high minimum, or the reason for imposing the sentence, the trial judge sentenced appellant on each of the three robbery counts to from six to

eighteen years, the sentences to run consecutively, "it being the intention of the Court that the defendant will serve a sentence of not less than eighteen years, nor more than fifty-four years in the aggregate." Tr. of Sentencing, Sept. 8, 1969, p.7.

SUMMARY OF ARGUMENT

The due process clause of the Fifth Amendment requires that a judge imposing an unusually long sentence make findings of special circumstances of the defendant that make such a sentence necessary. In choosing between a low maximum sentence and a high minimum, fundamental fairness requires that the sentencing judge disclose the reasons for choosing the sentence most adverse to the interest of the defendant. Lawyers and psychiatrists who have examined the question recently are agreed that very long prison terms present no tangible protection to society and at the same time substantially interfere with any incentive on the part of the offender to respond to treatment. In view of the doubts about the efficacy of long imprisonment, this Court should require a finding by the sentencing judge that special circumstances make a long sentence appropriate.

Due process requires the disclosure to the defense by the sentencing judge in advance of the sentencing hearing of all documents and other information on which an exceptionally long sentence is to be

based. If the defendant is denied access to the presentence report, assertions of previous criminal records, alleged arrests, trials (even if ended in acquittals) and errors of fact, may be before the court without an opportunity for either explanation or correction of errors. Despite the fact that substantial error may result from the use of presentence reports that contain false or constitutionally improper material, the defendant in the District of Columbia may be denied the opportunity to note, correct or seek review of the use of the constitutionally impermissible information as a result of the refusal of the sentencing judge to disclose the contents of such report.

The principle that the contents of a presentence report should be disclosed has been accepted by some parts of the federal judicial system, and by some state statutes and decisions. The judicial and statutory requirements of disclosure by the court of presentence reports do not appear to have interfered with the ability of the sentencing judge to arrive at a fair and appropriate sentence.

Refusal of the sentencing judge to disclose to defense counsel the contents of a presentence report is a denial to the appellant of the right to the effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States. Denial to defense counsel of the presentence report makes it impossible to discover and protect defendant against error, which, if known, would be grounds for reversal.

Failure to disclose the presentence report deprives the appellant of a basic element of the right of allocution. At common law, one of the important elements of the right of allocution was the opportunity allocution provided for the man before the sentencing court to assert and prove that he was not the man upon whom the penalty was intended to be imposed. The defendant is the only person whose knowledge of his past behavior is complete. Although it is colored by self-interest, utilization of such knowledge is essential to insure that defendant is to be held to account only for his own acts. Disclosure to defendant of allegations in the presentence report is essential if the defendant is to be judged only on the basis of his own behavior.

The appellant's sentence should be vacated and remanded to the sentencing court with instructions to reduce the sentence unless specific findings are made of special conditions warranting an exceptionally long sentence, and with instructions that all presentence reports on which the findings are based be disclosed to appellant.

ARGUMENT

I. The due process clause of the Fifth Amendment requires that a judge imposing an unusually long sentence make findings of special circumstances of the defendant that make such a sentence necessary.

Appellant's minimum sentence of eighteen years exceeds the fifteen-year minimum permitted under District of Columbia law for life sentences.

D.C. Code §24:203. The maximum imposed upon appellant was properly characterized seventy-nine years ago:

> "Fifty-four years confinement ... away from one's home and relatives, and thereby prevented from giving assistance to them or receiving comfort from them, is punishment at the severity of which ... it is hard to ... refrain from shuddering." O'Neal v. Vermont, 144 U.S. 323, 340 (1892) dissenting opinion.

When a high maximum sentence is chosen instead of a legally permissible lower maximum, fundamental fairness requires that the sentencing judge disclose the reason for choosing the sentence most adverse to the interest of the defendant. Such disclosure of reasons for a long sentence is especially necessary when the extraordinary length of the imprisonment results from a consecutive sentence.

The grossest kind of prejudice, arbitrariness and unfairness can hide behind an acceptance of an unfettered discretion in the sentencing judge to select any penalty from among the wide range of choices presented by the minimum and the maximum sentences authorized by law.

There is no dispute about the proposition that different criminal offenders require different modes of correction. This is the basis for exercise of judicial discretion in sentencing. However, correction cannot be limited to the punishment of the offender and deterrence of others, but must include opportunity for treatment and rehabilitation. Leach v. United States, 334 F.2d 945 (D.C. Cir. 1964). A leading

authority recently estimated that proper treatment can be successful in a majority of criminal cases. Menninger, The Crime of Punishment, 257-262. Both society and the offender have an interest in a sentence which permits diagnosis and appropriate treatment of the offender because satisfactory treatment will lead to the return of the offender to society as a productive member.

There is no doubt that some offenders should be incarcerated either because there is no expectation that any treatment will be successful, or because the nature of the problem of the particular offender requires treatment under circumstances of restraining social control. Menninger, The Crime of Punishment, 265. But whatever the need for imprisonment of offenders, lawyers and psychiatrists who have examined the question recently are agreed that prison terms in the range of forty to fifty years present no tangible protection to society and at the same time substantially interfere with any incentive on the part of the offender to respond to treatment. See Sentencing Alternatives and Procedures, American Bar Association Project on Minimum Standards for Criminal Justice Tentative Draft, p.141. See also American Law Institute Model Penal Code, §§6.06; 6.07; 7.03(4).

In view of the manifold doubts about the efficacy of long imprisonment. this Court should require a finding by the sentencing judge

that special circumstances make a long sentence appropriate. See Kent v. United States, 383 U.S. 541 (1966). Such findings should be based upon more than the defendant's demeanor at trial, and should be related to the findings of rehabilitation specialists about the defendant's likely response to imprisonment in a prison, as well as to findings about the desirability of allowing correctional personnel to determine whether and when the defendant is ready for treatment outside of prison.

Failure to require such analysis and findings by the trial judge may result in long prison sentences in cases in which such sentences are contraindicated. Long sentences tie the hands of therapists and other rehabilitative personnel, and serve to keep a man in prison long after anything can be achieved there for him. 3/

Until such time as the problem of high maximum sentences is dealt with in a manner consistent with the opinion of authorities in the field, sentencing judges must be required to give clear and cogent reasons for imposing draconian sentences.

Failure to require affirmative findings of reasons for long imprisonment subjects a defendant to an enhanced penalty which he cannot attack,

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3/ It may well be that appellant decided to risk escape from prison rather than accept the rehabilitative program largely because no matter how he might respond to treatment, he could not be freed for eighteen years.

and is so fundamentally unfair that it constitutes a denial of due process of law. See, e.g., Robinson v. California, 370 U.S. 660 (1962); Rochin v. California, 342 U.S. 165, 173 (1952).

Absence of a requirement of express statement of reasons for imposing an especially long sentence can permit arbitrary and capricious standards of judgment about a defendant's rehabilitative potential to replace the careful evaluation of experienced correctional authorities who can observe the individual after the therapy to determine his fitness to return to society.

Certainly the protection of the discretion of the trial judge in choosing from among sentencing possibilities does not require total absence of accountability for the choice that may result in the equivalent of a life sentence, when he also had the choice of as little as one year. If the special circumstances of the defendant are of such a serious nature that long imprisonment is required, regardless of the possibility of other later findings by penal authorities, they are serious enough to require an express statement of the precise nature of the circumstances and their relationship to the sentence imposed.

Hidden reasons for drastic sentences such as the one imposed upon appellant do not accord with developed notions of fundamental fairness.

If the sentencing court cannot make findings of special need for long imprisonment based upon either the trial record or the presentence report, the sentencing court should be prohibited from imposing the long sentence, particularly if it is imposed through consecutive sentences.

The multiplicity of consecutive sentences impairs a prisoner's opportunities for pardon or parole and in the absence of clear and compelling reasons, ought not to be permitted. Consecutive sentences make impossible the utilization of the rehabilitative potential of early parole, and without a special reason for imposition, should not be allowed. United States v. Machibroda, 338 F.2d 947 (6th Cir. 1964).

II. Due process requires the disclosure to the defense by the sentencing judge in advance of the sentencing hearing of presentence reports on which an exceptionally long sentence is to be based.

The principle that the defense should have access to information in the hands of the government bearing upon defense interest matters before the court is today well settled. Kent v. United States, 383 U.S. 541 (1966); Jencks v. United States, 353 U.S. 657 (1957). The interest of the defendant in liberty is one of the primary interests protected by the due process clause of the Fifth Amendment, and, therefore, a defendant is entitled to due process at the sentencing hearing, where he is most likely to lose his liberty. Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969).

Nonetheless, under present practice a defendant in the District of Columbia is required to appear at his sentencing, speak at his sentencing, and hear his fate, all without knowledge of the specific factors influencing the court. United States v. Isaacs, 299 F.Supp. 380 (D.D.C. 1969).

When the defendant is denied access to the presentence report, assertions of previous criminal records, alleged arrests, trials (even if ended in acquittals) and errors of fact, may be before the court without an opportunity for either explanation or correction of errors. See United States v. Cifarelli, 401 F.2d 512, 514 (2nd Cir. 1968), cert. denied, 393 U.S. 987 (1968). Sentence imposed upon the basis of erroneous information transmitted ex parte to the sentencing judge is not an unknown phenomen. See, e.g., Haller v. Robbins, 409 F.2d 857 (1st Cir. 1969).

The decisions are consistent in holding that a showing that a sentence based upon errors of fact concerning the defendant constitutes grounds for reversal. Townsend v. Burke, 334 U.S. 736 (1948). See also Hill v. United States, 368 U.S. 424, 429 (1962); Williams v. New York, 337 U.S. 241, 244 (1948). It has also been held that consideration in sentencing of information secured by illegal search and seizure is error. Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968).

Despite the fact that substantial error may result from the use of presentence reports that contain false or constitutionally improper material, the defendant in the District of Columbia may be denied the opportunity to note, correct or seek review of the use of the constitutionally impermissible information by the refusal of the sentencing judge to disclose the contents of such reports.

Thus appellant, who had no previous criminal record and who had been honorably discharged from the United States Navy, may have been sentenced on the basis of presentence information that confused him with someone who had a criminal record.[4/] Appellant cannot raise such issues because the rules as utilized by the sentencing court have resulted in hiding any mistakes from appellant and his counsel. See Tr. of Sentencing, Sept. 8, 1969, p.2; United States v. Isaacs, 299 F.Supp. 380 (D.D.C. 1969).

This denial of access to presentence reports is not required by the Federal Rules of Criminal Procedure. Rule 32 specifically permits disclosure of the presentence report to both defense and prosecution.[5/]

4/ Appellant strongly urges that his conviction for crimes committed after his escape from his jail term under the sentence attacked here cannot be used to justify the reimposition of the earlier eighteen to fifty-four year sentence.

5/ The argument that the presentence report should not be revealed to the defense because it must then be revealed to the prosecution has no merit. The trial has ended and the information in the presentence report should be available equally to prosecution and defense for the purpose of correction of errors that might interfere with the proper exercise of judicial discretion.

The principle that the contents of a presentence report should be disclosed to the defense with some opportunity for refutation of erroneous material has been accepted by some parts of the federal judicial system. See Baker v. United States, 388 F.2d 931, 933 (4th Cir. 1968); United States v. Conway, 296 F.Supp. 1284, 1285 (D.D.C. 1969). See also Austin v. United States, 408 F.2d 808, 810 (9th Cir. 1969); United States v. Doyle, 348 F.2d 715, 720-721 (2nd Cir. 1965), cert. den. 382 U.S. 843 (1965).

However, practice may differ within the same circuit. For example, in the District Court for the District of Columbia Circuit, the position of one judge is that "this Court is willing ... to discuss the significant aspect of a presentence report with defense counsel informally and thus place defense counsel in a position to rebut any significant information therein." Gesell, J. in United States v. Conway, 296 F.Supp. 1284, 1285 (1969). Another judge in the same court divulges no information about the contents of presentence reports. Tr. of Sentencing, Sept. 8, 1969, p.2-3; Siricca, J., United States v. Isaacs, 299 F. Supp. 380 (D.D.C. 1969).

Although both judges refuse to permit inspection of the presentence reports by the defense, one judge is prepared to disclose some of the contents of the report, placing defendant in a slightly better position than that existing when there is total sequestration of the presentence reports.

In contrast to the refusal of some courts to permit inspection of the presentence report upon which the defendant's entire future may rest, there are states whose codes require disclosure of such reports.

The California Penal Code provides in pertinent part, that:

> "The probation officer must ... make an investigation of the circumstances surrounding the crime and of prior record and history of the defendant, must make a written report to the court of the facts found upon such investigation, and must accompany said report with his recommendations including his recommendation as to the granting or withholding of probation to the defendant and as to the conclusions of probation if it shall be granted. The report and recommendations must be filed with the clerk of the court as a record in the case." Cal. Pen. Code Ann. §1203 (West 1956)

Thus the presentence report is open to anyone, including the defendant and his counsel.

The Alabama Code mandates that

> "all reports, records and data assembled by any probation officer and referred to the Court shall be privileged and shall not be available for public inspection except upon orders of the Court to which the same was referred. And provided, however, that in no case shall the right to inspect said report be denied the defendant or his counsel after said report has been completed and filed." Ala. Code, tit. 42, §23 (1959)

The State of Ohio provides that:

> "The trial court may hear testimony of mitigation of a sentence at the time of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state to give the court a

> true understanding of the case .... The court of its own motion may direct the department of probation ... to make such inquiries and reports as the court requires concerning the defendant. The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for the purposes of determining the disposition of the case .... Such reports shall be made in writing in open court in the presence of the defendant except in misdemeanor cases in which sentencing may be pronounced in the absence of the defendant. A copy of each such reports shall be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein." Ohio Rev. Code Ann., tit. 29, §2947.06 (1953)

The Minnesota Criminal Code contains a provision that pre-sentence reports made to the court:

> "shall be open to inspection by the prosecuting attorney and the defendant's attorney prior to sentence and on request of either of them a summary hearing in chambers shall be held on any matter brought in issue ...." Minn. Crim. Code §609.115, subd. 4 (1963)

The Minnesota statute protects confidential sources and limits public disclosure of the report.

Virginia law requires that:

> "The probation officer shall present his report in open court in the presence of the accused who shall be advised of the contents of the same and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter which he may desire to present. The report of the investigating officer shall be filed as a part of the record in the case." Va. Code §53-278.1 (1950)

The British Criminal Justice Act of 1948 requires that a copy of the presentence reports be given by the court to the offender or his counsel or solicitor. 11 and 12 Geo. 6 1948, ch. 58, §43.

The Supreme Court of New Jersey has recently agreed that rudimentary fairness requires disclosure of the presentence report. In a decision on an appeal attacking the failure of the sentencing judge to disclose the pretrial report, the court said:

> "It is entirely clear to us that the trial judge should have acceded to the request by defense counsel at sentencing for an opportunity to review the presentence report; accordingly, the matter will be remanded for resentencing after the defendant has been furnished with a copy of the report and has been afforded fair opportunity to meet any prejudicial material which may play a part in sentencing." State v. Kunz, 38 U.S.L.W. 2403 (N.J. Dec. 16, 1969)

These statutory and judicial requirements of disclosure of presentence reports, either to the public at large as part of court record, or limited to defense and prosecution, do not appear to have interfered with the ability of the sentencing judge to arrive at a fair and appropriate sentence. Consideration of prior convictions and other behavior is still permitted, See, e.g., Baker v. United States, 388 F.2d 931, 933 (4th Cir. 1968).

It would appear that the underlying thrust of these decisions and statutes is the securing of that information which is essential to proper protection of the interest of the defendant. It is the same thrust that

> true understanding of the case .... The court of its own motion may direct the department of probation ... to make such inquiries and reports as the court requires concerning the defendant. The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for the purposes of determining the disposition of the case .... Such reports shall be made in writing in open court in the presence of the defendant except in misdemeanor cases in which sentencing may be pronounced in the absence of the defendant. A copy of each such reports shall be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein." Ohio Rev. Code Ann., tit. 29, §2947.06 (1953)

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It would appear that the underlying thrust of these decisions and statutes is the securing of that information which is essential to proper protection of the interest of the defendant. It is the same thrust that

led to the requirements of disclosure in Kent v. United States, 383 U.S. 541 (1966) and Jencks v. United States, 353 U.S. 657 (1957).

An American Bar Association study has found that fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects the defendant's interest should be called to the attention of the defense. American Bar Association Project in Minimum Standards for Criminal Justice, Standard Relating to Sentencing Alternatives and Procedures (Tentative Draft) §4.4.

Refusal to disclose the contents of the presentence report does not protect the judge's discretion; it protects instead the errors of those reporting to the judge about the defendant's past behavior and his present condition.

Appellant urges that the deprivation of due process is particularly acute for him because he has been sentenced to an extended prison term with no knowledge of the basis on which his special sentence was set.

III. Refusal of the sentencing judge to disclose to defense counsel the contents of a presentence report is a denial to the defendant of the right to assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States.

The right to the effective assistance of counsel goes beyond the mere right to be accompanied by counsel. It must consist of the right to the active protection of the interest of the client by counsel, the use of counsel's skills in interpreting the law as it affects the client's interest

and counsel's full effort in persuading the court that these interests and the law coincide. Anders v. California, 386 U.S. 738, 744 (1967). The right to counsel extends to the sentencing hearing. Mempa v. Rhay, 389 U.S. 128 (1967); Von Moltke v. Gibbes, 332 U.S. 708 (1948).

The right to representation by counsel has been held to be more than a formality or a "grudging gesture to ritualistic requirement." Kent v. United States, 383 U.S. 541 (1966). But the appearance of counsel at a sentencing hearing is little more than a ritualistic formality where counsel is unable to protect the defendant against erroneous submission of information that may influence the sentencing judge.

In the absence of knowledge of whether there is matter in the presentence report that requires refutation or explanation, counsel is placed in the position of a petitioner, directing his imprecations to the sentencing judge, not certain for what he should pray. At the sentencing hearing it is defense counsel who is rendered blind by justice whose eyes may be directed to a report erroneous in every detail.

Denial to defense counsel of the presentence report makes it impossible to discover and protect defendant against errors which, if known, would be grounds for reversal on review. See, e.g., Townsend v. Burke, 334 U.S. 736 (1948); Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968).

The possibility that proceedings will move with less dispatch, or that counsel will raise difficult questions, is not a valid basis for imposing limitations on counsel's ability to protect the defendant. United States v. Wade, 388 U.S. 218, 237-238 (1967).

IV. Failure to disclose the presentence report on which the judge's sentence is based deprives the appellant of a basic element of the right of allocution.

Rule 32(a)(1) of the Federal Rules of Criminal Procedure requires the sentencing court to permit the defendant to make a statement in his own behalf and to present any information in mitigation of punishment. Growing out of the common law right of allocution, the opportunity to speak in his own behalf is of great importance to the defendant. Green v. United States, 365 U.S. 301 (1961).

Because of the penalty of attainder at early common law, one of the important elements of the right of allocution was the opportunity allocution provided for the man before the sentencing court to assert and prove that he was not the man upon whom the penalty was intended to be imposed. Barrett, Allocution, 9 Missouri Law Review 115. The same need exists today to be certain that the man before the court is the man for whose acts the court is imposing sentence. When the defendant is sentenced on the basis of the record of another, the sentence has been reversed on review. Townsend v. Burke, 334 U.S. 736, 740 (1948).

In today's mass society in which different persons with the same name may be confused, or one's identity assumed by another, the possibility of erroneous identification is great. Additionally, police and other records tend to be sketchy and impersonal, with the result that defendant is the only person whose knowledge of his past behavior is complete. Although it is colored by understandable self-interest, utilization of this knowledge is essential to insure that the defendant is held to account only for his own acts.

Disclosure to defendant of allegations in the presentence report is essential if the defendant is to be judged only on the basis of his own behavior, and not that of others.

Especially in the case of a person such as appellant, who had no previous record, certainty that the presentence report is accurate is necessary to avoid injustice.

CONCLUSION

For the foregoing reasons, appellant submits that his sentences should be vacated and remanded to the sentencing court with instructions to reduce the sentences unless specific findings are made of special conditions warranting an exceptionally long sentence, and requiring

that all presentence reports upon which findings are based be disclosed to appellant and his counsel in advance of the sentence hearing.

Respectfully submitted,

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Counsel for Appellant
(Appointed by this Court)

CERTIFICATION

A copy of brief for appellant was served upon the U.S. Attorney for the District of Columbia this 14 day of February, 1970.

Patricia Roberts Harris